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IN THE SUPREME COURT OF THE UNITED STATES

No. _____

ESTHER GOODYEAR,
Petitioner,
v.
THE GATES RUBBER COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Esther Goodyear prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on August 9, 1974, affirming the judgment of the United States District Court for the District of Colorado entered on October 15, 1973.

OPINION BELOW

The judgment and opinion of the District Court for the District of Colorado dismissing the petitioner's complaint is reported at and is printed in Appendix A hereto. The opinion of the Court of Appeals which affirmed the judgment of the District Court is unreported and is printed in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on August 9, 1974. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the District Court had discretion to deny petitioner's motions to maintain the action as a class action without making written findings or otherwise stating its reasons so that the Court of Appeals had no opportunity to ascertain whether the District Court applied the proper criteria.

2. Whether the District Court incorrectly applied the law to the facts of the case when:

a) it ruled that evidence of sexual advances and other improper conduct by a supervisor of petitioner would not be admitted unless the petitioner could establish that such conduct was part of the respondent's official policy or that the respondent participated in such conduct;

b) it concluded that petitioner had not been discriminated against on account of her sex because the jobs for which petitioner was considered and turned down were filled by females, and that a "femininity test" administered to petitioner was not used to her prejudice or to the prejudice of other females.

STATUTES AND FEDERAL RULES INVOLVED

The pertinent provisions of 28 U.S.C. 1343(4), 42 U.S.C. §2000e-2(a), 42 U.S.C. 2000e-5(f)(3), 42 U.S.C. 2000e-5(g) and Rules 23 and 52 of the Federal Rules of Civil Procedure are set forth in Appendix C.

STATEMENT OF THE CASE

Petitioner brought this action in the District Court pursuant to the Civil Rights Act of 1964, Title VII, 42 U.S.C. §§2000(e) et seq. and 28 U.S.C. §1343. Petitioner was employed by respondent manufacturing company in its office division from 1960 until April, 1971.

Petitioner alleged that respondent discriminated against her and other female employees in violation of Title VII through certain customs, practices and usages with respect to hiring, promotions, compensation, tenure and other employment conditions. She also alleged in her Second Amended Complaint[1] that respondent fired her in retaliation for the filing of this action.

Petitioner sought to represent a class consisting of all female persons employed by respondent since July 2, 1965, at its general office and factory located in Denver, Colorado. Petitioner's motions to maintain the class action were denied on three different occasions by the Trial Court.[2] At no time did the Trial Court make written findings, and the reasons for the Trial Court's rulings do not appear in the record.

At trial petitioner's evidence showed the following.

Petitioner's educational background consisted of high school and typing and secretarial instruction. Prior to her employment by respondent, she had held jobs as a bookkeeper, bookkeeping machine operator and waitress. During her term of employment with the respondent, the positions she held were classified as clerical, stenographic or secretarial, although petitioner for eight of the ten years of her employment performed market analysis and other work which was not strictly clerical, stenographic or secretarial. During the eight-year period, the majority of petitioner's tasks required expertise and knowledge of the functions of the department in which she was working, the exercise of discretion and judgment, and assumption of responsibility beyond that customarily required of a clerk, stenographer or secretary. The evidence was undisputed that during this eight-year period, which ended in October, 1969, petitioner's work was satisfactory. In October, 1969, in response to a request for promotion, petitioner was transferred to a secretarial position in a different department, which petitioner contends was a demotion in terms of the skills required of her in the new position although there was a small increase in pay. In May, 1970, petitioner was transferred to a stenographer's position in another department of the company with a reduction in pay, where she remained until she was terminated by the respondent in April, 1971, shortly after this action was filed in the District Court.[3] The respondent contended that the petitioner's performance in the last two positions was unsatisfactory and she was terminated for this reason alone.[4]

Jobs in the office division of the respondent were divided into two payroll categories referred to as "exempt" and "non-exempt" from the overtime pay provisions of the Fair Labor Standards Act. Exempt employees were salaried employees and as a group were more highly paid than the non-

exempt employees. Non-exempt employees were paid at an hourly rate.[5] The exempt payroll consisted of 1,044 men and 55 women. The non-exempt payroll consisted of 653 women and 251 men. No woman employee earned a salary in excess of $20,000 a year. In the $10,000 to $20,000 annual income category there were 1,228 men and 28 women. The respondent admitted that most of its managers of departments and divisions have been men and noted that certain secretarial positions had responsibilities comparable to a deputy manager.[6]

Other evidence was that certain employment privileges—use of a gymnasium and membership in a company social club known as The Gates Fire Brigade were available only to men.[7] There was also evidence of a union contract covering employees in the factory which provided for separate male and female job categories and lines of promotion.[8]

The thrust of respondent's evidence was directed toward purportedly negative aspects of petitioner's personality and job performance. The respondent did not present any evidence to explain the disparity in numbers of males and females in high income and low income categories and in the exempt and non-exempt categories. To the contrary, the testimony of the respondent's personnel officers offered by respondent tended to establish that petitioner was locked into the predominately female secretarial or non-exempt category.

When the petitioner was hired by the respondent in 1960, she was given a "femininity test" as a part of a so-called personality profile test administered to all new employees.[9] Although no company purpose was served by the

femininity test,[10] the petitioner's evidence was that her "score" on the femininity test remained in her file throughout most of her employment term and was discussed with her by her supervisor in 1970.[11]

At all times during her employment, the petitioner's job was classified as "non-exempt". The petitioner endeavored to improve her position with respondent by advising her supervisors and the appropriate persons in the company personnel department of her interest in advancement on several occasions. The procedure upon receipt of such a request was for the personnel department to present the applicant's file to supervisors of departments which had an opening for which the applicant was deemed qualified. It is clear from the evidence that petitioner was considered only for transfer or promotion to other secretarial positions, most of which were in the lower paid non-exempt category.[12] The respondent, in determining that petitioner's file would not be considered for anything but clerical, stenographer or secretarial openings, failed to give petitioner credit for her employment experience with the company in which she acquired knowledge and skills beyond that required of a clerk, stenographer or secretary. There was evidence that male employees of the company were not so limited.[13]

The petitioner attempted unsuccessfully to introduce evidence of sexual advances and other improper conduct of a supervisor. The trial court reasoned that the petitioner had to show that such conduct was part of the respondent's official policy.[14]

Since petitioner's personnel file was presented only for secretarial positions or positions in the non-exempt category, the positions for which petitioner was passed over were

generally filled by females. This led the Trial Court to conclude that the petitioner was not passed over for promotion on account of her female sex.[15]

The essence of the petitioner's claim is that the respondent's policies, customs, and practices created an atmosphere of discrimination against females so that once the petitioner was placed in the predominately female-secretarial-non-exempt category of job she was never given the opportunity to apply or be trained for positions outside that category. Petitioner contends that Trial Court's decision therefore incorrectly applied the law to the facts and does not reach the substantial questions which the petitioner raised.

References to the record are designated "R". References to the trial transcript are designated "T".

[1] R. 108
[2] R. 161, R. 266, T. 328
[3] T. 19-87
[4] T. 399-415, T. 631-642, T. 662-667
[5] T. 183
[6] T. 325, R. 269, R. 272-275, R. 520
[7] R. 122-123
[8] T. 325, R. 272
[9] T. 49-54, T. 104
[10] T. 106
[11] T. 207
[12] T. 458-502
[13] T. 59, T. 75, T. 147-154
[14] T. 121, T. 146, T. 195
[15] R. 412

REASONS FOR GRANTING THE WRIT

I. *This petition raises the substantial question of whether a District Court has discretion to deny a motion to maintain a class action without making written findings or otherwise stating its reasons so that the Reviewing Court has no basis to determine whether the District Court applied the proper criteria.*

A. By holding that the District Court acted within its discretion in denying the class action without having an opportunity to review the criteria which the Trial Court applied to arrive at its determination, the Court of Appeals rendered a decision which conflicts with the decisions of other courts of appeals as well as its own prior decisions.

The decision in this case departs from the established rule that the Trial Court acts within its discretion in granting or denying a motion to maintain a class action when there has been a proper appraisal of the relevant factors recited in Rule 23(a) and (b) of the Federal Rules of Civil Procedure. *Eisen v. Carlisle & Jacquelin,* 391 F.2d 555 (2nd Cir., 1968); *Green v. Wolf,* 406 F.2d 291 (2nd Cir., 1968); *City of New York v. International Pipe & Ceramics Corp.,* 410 F.2d 295 (2nd Cir., 1969); *Head v. Timkin Roller Bearing Co.,* 486 F.2d 870 (6th Cir., 1973); *Esplin v. Hirschi,* 402 F.2d 94 (10th Cir., 1968) cert. denied 394 U.S. 928, 89 S.Ct. 1194, 22 L.Ed.2d 459; *Goldstrike Stamp Co. v. Christensen,* 436 F.2d 791 (10th Cir., 1970).

Because the Trial Court made no findings the Reviewing Court had no basis for ascertaining that the Trial Court's decision was arrived at by application of the correct

criteria to the facts of this case. *Gold Strike Company v. Christensen, supra.*

The class action is an especially important and useful tool for vindication of rights under Title VII of the Civil Right Act. *Gerstle v. Continental Airlines,* 50 F.R.D. 213 (D.Colo., 1970). A class action should not be denied without full consideration of the Rule 23 factors and a careful articulation of the reasons for denial. Since failure to apply the criteria of Rule 23 is ground for reversal, 3B Moore's *Federal Practice* §23.50 (2nd Ed. 1969), it cannot seriously be contended that the Trial Court has discretion whether or not to state what criteria, if any, it applied.

The concern of the Appellate Court that petitioner was the only named representative of the asserted class is misplaced. The test of adequate representation of the class is not quantitative, *Green v. Wolf, supra, Eisen v. Carlisle & Jacquelin, supra,* and a class action may be maintained even if only one person has filed a discrimination charge. *Oatis v. Crown Zellerback Corp.,* 398 F.2d 496 (5th Cir., 1968); *Miller v. International Paper Co.,* 408 F.2d 283 (5th Cir., 1969).

B. The Trial Court's abuse of discretion becomes absolutely clear when peititioner's contention that this is a proper case for a class action is measured by the requirements of Rule 23(a) and Rule 23(b)(2).

The class meets the numerosity requirement of Rule 23(a)(1). Petitioner seeks to represent all present and former female employees who have been employed by the respondent since July, 1965. A joinder of all these persons would be impractical and would result in a burden upon the court which Rule 23 was designed to avoid. 3B Moore, *Federal Practice* §23.05 at 23-28 (1970).

There are questions of law or fact common to the class as is required by Rule 23(a)(2). The allegation which applies to all members of the class is that the respondent has denied equal employment opportunity to women. For example, petitioner alleged that respondent:

(1) Segregated women into certain traditional job positions and has not allowed them to transfer and be promoted in the same manner as men;

(2) Subjected women to a separate and segregated lay-off system;

(3) Required women job applicants and employees to submit to tests which have not been validated as successful indications of job performance, in violation of Equal Employment Opportunity Commission Regulation Guidelines, 29 C.F.R. 1607, 35 F.R. 12333 *et. seq.*

(4) Failed to completely remedy the effects of discriminatory types of job classifications and testing procedures.

Such "across-the-board"allegations of employment discrimination are sufficient to meet the requirement of common questions of law or fact of Rule 23(a)(2). *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir., 1969).

Rule 23(a)(2) does not require absolute identity of facts among members of the class. By its express terms, it is satisfied if some common questions exist. *Gerstle v. Continental Airlines, Inc., supra; Johnson v. Georgia Highway Express, Inc., supra.* In this action the situation of discrimi-

nation against women by the respondent is a fact common to all members of the class. While the specific facts of each denial of equal employment opportunity may differ, it is sufficient that as to the totality of issues there is a nucleus of common facts. *Esplin v. Hirschi, supra.*

Petitioner's claims are typical of the claims of the class. Rule 23(a)(3). The typicality requirement has been broadly construed in Title VII cases. *Gerstle v. Continental Airlines, Inc., supra; Johnson v. Georgia Highway Express, Inc., supra; White v. Gates Rubber Co.,* 53 F.R.D. 412 (D.C. Colo., 1971). Here an affidavit submitted by petitioner and testimony elicited at trial showed that other women employed by the respondent were also discriminated against on the basis of sex. In addition, the statistics showed a wide discrepancy in the positions and salaries of male and female employees. The foregoing establishes typicality.

Petitioner fairly and adequately protects the interests of the class as required by Rule 23(a)(4). Petitioner is adequately represented by counsel; she is not involved in a collusive suit, and her interests are not antagonistic to those of the class. *Eisen v. Carlisle & Jacquelin, supra.* The interests of petitioner and other members of the class in eliminating barriers to equal employment opportunity for female employees are identical.

Adequate representation does not necessarily mean that the named plaintiff must prove that she will succeed in her case. *Huff v. N.D. Cass Co. of Alabmaa,* 6 E.P.D. §8800 (5th Cir., 1973); *Hutchings v. United States Industries, Inc.,* 428 F.2d 303 (5th Cir., 1970).

Further, a named plaintiff may also be an adequate

representative of the class even though she is no longer employed by the defendant. *Reyes v. Missouri-Kansas-Texas R.R. Co.*, 53 F.R.D. 293 (D. Kan., 1971); *Johnson v. Georgia Highway Express, Inc., supra.*

Finally, the respondent has acted or refused to act on grounds generally applicable to the class. Rule 23(b)(2). According to the Advisory Committee Note to Rule 23(b)(2), this subdivision is especially appropriate, "in the civil rights field where the party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration".

II. *This petition raises substantial questions regarding the District Court's incorrect application of the law to the facts of the case.*

The Court of Appeals limited its review of the District Court's decision to the "clearly erroneous" Standard of Rule 52(a), Federal Rules of Civil Procedure, and in so doing placed itself in opposition to decisions of other circuit courts and this Court.

When the Trial Court's findings evidence an erroneous view of controlling legal principles, the "clearly erroneous" standary does not limit the Appellate Court in its review of the facts adduced at trial. *Rowe v. General Motors Corporation*, 457 F.2d 348, 356 (5th Cir., 1972).

A. The ruling that evidence of sexual advances and other improper conduct by the petitioner's supervisor would not be admitted unless the petitioner could establish that the conduct was part of the respondent's official policy or that the respondent participated in it was erroneous.

Petitioner's supervisor was respondent's agent. It is elementary that an agent's actions may be imputed to his principal and admitted into evidence in an action against the principal by the third party. McCormick, *Evidence,* §267 (2nd Ed., 1972).

In addition to the general rule that a corporate agent's acts may, under the proper circumstances, be imputed to the corporation, the courts have fashioned a special rule to impute discrimination to the principal in Title VII cases. See, *Tidwell v. The American Oil Co.,* 322 F.Supp. 424 (D. Utah, 1971) in which it was stated that a corporate employer may not hide behind the shield of individual employee action. See also, *Anderson v. Methodist Evangelical Hospital,* 464 F.2d 723 (6th Cir., 1972); *E.E.O.C. Decision* 71-2725, 4 F.E.P. Cases 26 (1971); *Murry v. American Standard, Inc.,* 5 E.P.D. 8523 (ED La., 1973); *E.E.O.C. Decision* 72-1561, 4 F.E.P. Cases 853 (1972) and *Aeronca Mfg. Company v. NLRB,* 385 F.2d 724 (9th Cir., 1967).

B. The District Court's conclusion that petitioner had not been discriminated against on account of her sex because the jobs for which petitioner was considered and turned down were filled by females and that a "femininity test" administered to petitioner was not used to her prejudice or the prejudice of other females indicates that the District Court did not correctly apply the law to the facts of the case.

The District Court failed to take into account the special standard of proof which has been established in cases involving Title VII of 42 U.S.C.

When the petitioner made a *prima facie* showing of the forbidden discrimination, the burden shifted to the re-

spondent to establish that the apparent discriminatory policy, practice, or effect of a policy, is grounded upon a non-discriminatory business necessity. *Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir., 1970); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir., 1972); Marquez v. Omaha District Sales Office, Ford Division of Ford Motor Co., 440 F.2d 1157 (8th Cir., 1971); McDonnell Douglas Corporation v. Green, 411 U.S. 792, 41 LW 4651 (1973).*

Statistical evidence may establish a *prima facie* case that discrimination is a factor in staffing job categories. *Jones v. Lee Way Motor Freight, Inc., supra.*

In the instant case, petitioner established, through the testimony of the respondent's personnel manager, that a great disparity existed between the numbers of males and females in higher paying, more responsible positions and conversely, that the females greatly outnumbered the males in the lower paying, non-salaried, clerical-type positions. Petitioner therefore made her required *prima facie* case. But the personnel manager testified that there was no business necessity or business justification to explain the disparity; in fact the record fails to show any such justification whatsoever. Instead, the respondent founded its defense upon the subjective theory that Mrs. Goodyear was fired because of her "attitude". The respondent did not sustain the burden of proof shifted by plaintiff's establishment of her *prima facie* case.

Since the District Court found that, "The refusal of these department managers was in no way influenced by the fact that the plaintiff was a female and there is no evidence that any of these positions were filled by other than female employees", it is obvious that petitioner's background statis-

tics were not considered in the light of *Jones v. Lee Way Motor Freight, Inc., supra.* The evidence was that most women employed in the office division of respondent are secretaries or clerical workers. Therefore the finding that "these positions were filled by . . . female employees" acknowledges the fact that the petitioner met her burden and that the respondent failed to rebut the *prima facie* case.

Even if the respondent had rebutted the *prima facie* case, the petitioner was entitled to show that the respondent's stated reasons for the failure to promote the petitioner and her ultimate termination were merely pretextual. *McDonnell Douglas Corp. v. Green, supra.* This the petitioner did when she presented evidence of discriminatory policies and practices which predated by several years the time at which the respondent contended the petitioner's job performance was unsatisfactory. The respondent could not use petitioner's conduct as an excuse for perpetuating the discriminatory job classification system which locked the petitioner into a lower-paying predominately female classification. See *Jones v. Lee Way Motor Freight, Inc., supra.*

The courts below also failed to apply the rule of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), in which this Court specifically disapproved of test procedures (like the "femininity test" given to petitioner) which perpetuate unlawful discrimination and are unrelated to job performance.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Arnold Alperstein
Alperstein, Plaut and Barnes p.c.
Attorneys for Petitioner
7000 West Fourteenth Avenue
Lakewood, Colorado 80215

Of Counsel:
Mark A. Roye
1911 11th Street
Boulder, Colorado 80302

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO Civil Action No. C-2961

ESTHER GOODYEAR,

Plaintiff,

vs. JUDGMENT OF DISMISSAL

THE GATES RUBBER COMPANY,

Defendant.

PURSUANT TO and in accordance with the Order of Court heretofore entered; it is

ORDERED that this action and the complaint herein are hereby dismissed with prejudice; and it is further

ORDERED that the defendant, above-named, have and recover of the plaintiff, above-named, judgment for its costs to be taxed by the Clerk upon the filing of a Bill of Costs.

DATED at Denver, Colorado, this 15th day of October, 1973.

BY THE COURT:

/s/ HATFIELD CHILSON

HATFIELD CHILSON
United States District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
Civil Action No. C-2961

ESTHER GOODYEAR,
Plaintiff,

vs.

THE GATES RUBBER COMPANY,
Defendant.

Mr. Michael L. Bender, Attorney at Law, 1812 California Street, Room 207, Denver, Colorado 80202, for Plaintiff; Mr. Dayton Denious, Attorney at Law, 2220 First National Bank Building, Denver, Colorado 80202, for Defendant.

CHILSON, Judge.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This is an action in which the plaintiff seeks relief pursuant to 42 U.S.C. §2,000e, et seq., commonly referred to as a Title VII Civil Rights action.

In summary, the plaintiff claims she was discriminated against on account of her sex, such discrimination resulting in the following:

1. She was not promoted to a job for which she was qualified.

2. She was demoted;

3. She was required to take a femininity test and on account thereof, she was denied equal employment opportunity.

Additionally, she claims that her employment was terminated in retaliation for instituting proceedings for relief pursuant to Title VII and the filing of this action.

The matter was tried to the Court without a jury, and the Court having heard the evidence and argument of counsel makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The plaintiff is a high school graduate and except for some instruction in typing and secretarial work, she had no further formal education prior to her employment by the defendant.

2. Prior to her employment by the defendant, plaintiff was employed for a period of three years as a waitress, approximately two years as a bookkeeper, and for approximately one year as a bookkeeping machine operator.

3. In 1960, plaintiff applied to defendant for employment and was employed by the defendant in a clerical capacity and she was thereafter continuously employed by defendant until her discharge in April of 1971

From May of 1963, until October, 1969, she was employed in the Industrial Belt Sales Division of the Company as a secretary. Her supervisor was Mr. Stetson, who was later succeeded by Mr. Custer, who continued to be her supervisor until she left that Department in October, 1969.

4. Becoming dissatisfied with the lack of opportunity for advancement in the Industrial Belt Sales Department, in 1969, she requested a transfer to another division. In late 1969, she was offered and accepted a position in the Private Brands Sales Department whose manager was Mr. Kenney. This new position was a promotion in classification and a small increase in pay.

The plaintiff's position with the Private Brand Sales Department had previously been performed by one Maryln Jones, who was promoted, thus creating the vacancy filled by the plaintiff. Maryln Jones was assigned by Mr. Kenney to train the plaintiff in her new position. Although the plaintiff had the technical skills to do the work required, she did not perform the work adequately or satisfactorily.

Mr. Kenney notified the plaintiff that because of her failure to perform her work in a satisfactory manner that it would be necessary for him to dispense with her services effective April 30, 1970, and that she should, in the meantime, locate another position of employment with the company.

Whether her failure to perform was due to lack of proper training by Miss Jones or a lack of interest or a refusal on the part of the plaintiff to accept training, was the subject of conflicting evidence, but there is no evidence that she was replaced because she was a female.

The vacancy created by the termination of the plaintiff's employment with the Private Brands Sales Department was filled by another female who performed the work in a satisfactory manner.

5. The plaintiff's availability for other employment within the company was circulated to other departments, and a few interviews were granted, but none of the departments who had vacancies to be filled equal to the plaintiff's classification were willing to employ her. The refusal of these department managers was in no way influenced by the fact that the plaintiff was a female and there is no evidence that any of these positions were filled by other than female employees.

6. On April 30, 1970, the day on which plaintiff's employment with Mr. Kenney expired, the plaintiff was notified of a vacancy in the MRG Technical Department of which Claude Henderson was the supervisor. The classification of the position was "Steno A" a lower-rated job and one which paid less than the secretarial position which plaintiff held in Mr. Kenney's department. The plaintiff accepted this position and was employed in that position from May 1, 1970, until her termination on April 16, 1971.

7. Shortly after she took this position, the plaintiff evidenced an extreme dislike for and hostility toward Mr. Henderson, the Manager of that department and engaged in a course of conduct which disrupted the operation of the department and the morale of the employees. This conduct included the generation of arguments with fellow employees, sarcastic comments directed to Mr. Henderson and fellow employees, hostile and antagonistic attitudes toward them and a noncooperative attitude in carrying out her duties.

This conduct so affected the efficiency and morale of the department that Mr. Henderson's superior, Mr. Redmond, in August, 1970, required reports from Mr. Hender-

son as to the plaintiff's attitude and activities. Exhibit J contains the notes kept by Mr. Henderson of plaintiff's conduct and these notes were the basis for Mr. Henderson's reports to Mr. Redmond.

On or about November 9, 1970, the plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission. In this claim she stated;

> "The company discriminates against women by placing them into lower job classifications, by denying them promotional opportunities in a similar manner as those opportunities offered to male employees, and by imposing different terms, conditions and privileges of employment. I have been recently demoted and have not been given job advancement opportunities because I am female."

Thereafter, the plaintiff received from the Commission a notice of her right to bring suit in the United States District Court and this action was instituted accordingly on March 10, 1971

At the time Mr. Redmond arrived at his decision to terminate the plaintiff's employment, neither he nor Mr. Henderson were aware of the fact that the plaintiff had filed charges with the Equal Employment Opportunity Commission and Mr. Redmond's decision to terminate the plaintiff was made prior to the filing of this action.

The Court finds that the decision to terminate plaintiff's employment was not, either in whole or in part, in retaliation for the plaintiff's filing charges with the Commission and the institution of this action.

8. The evidence fails to show any occasion when the company had an operning for employment in a position for which plaintiff was qualified and which was a better position than that held by her and which the company denied to her because she was female.

9. Plaintiff testified to a number of matters such as work breaks, with respect to which she alleged she had been treated unfairly. In most instances, her testimony did not fix the dates when the alleged wrongs occurred and in all such cases, her claim was only that she as an individual had not been treated fairly and not that she had been so treated because she was a female.

10. Plaintiff complained of a psychological test administered to her in 1960 which purported to measure a number of qualities including "femininity". There is no evidence that this test was used to the prejudice of females as a class or that it ever operated to the prejudice of plaintiff.

11. The evidence does not sustain any claim upon which the plaintiff is entitled to relief.

12. There was introduced into evidence proceedings before the Industrial Commission of the State of Colorado adjudicating a claim of the plaintiff after her discharge for unemployment compensation benefits. These proceedings were offered by the defendant on the theory that the findings of the Commission of the reasons why the plaintiff was discharged by the defendant are binding on this Court in this proceeding. The tender for this purpose is refused and this Court determines that the findings of the Industrial Commission in this respect are not binding on this Court and are not proper evidence to be considered by this Court. The Court

therefore has arrived at its Findings of Fact from evidence other than the findings of the Industrial Commission and these findings have been entirely disregarded by the Court.

CONCLUSIONS OF LAW

Upon the foregoing Findings of Fact, the Court concludes as matters of law;

1. That the plaintiff was not denied promotion or demoted or terminated as an employee of the defendant because of discrimination against her on account of her sex;

2. That the plaintiff was not terminated from her employment with the defendant in retaliation for the filing of charges with the Equal Employment Opportunity Commission or because of the institution of this suit.

3. That final judgment of dismissal of this action with prejudice should be forthwith entered.

IT IS THEREFORE ordered that final judgment of dismissal of this action with prejudice shall forthwith enter.

Entered this 15th day of October, 1973.

BY THE COURT:

/s/ Hatfield Chilson
United States District Judge

Aug 9 1974
Howard K. Phillips
Clerk, United State
Court of Appeals
Tenth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 73-1973

Appeal from the United
States District Court
for the District of
Colorado (D.C.No.C-2961)

ESTHER GOODYEAR,
Plaintiff-Appellant,
vs.
THE GATES RUBBER
COMPANY,
Defendant-Appellee.

Before PICKETT, Senior Circuit Judge, and SETH and McWILLIAMS, Circuit Judges

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PER CURIAM

Mrs. Esther Goodyear appeals from an order of the United States District Court for the District of Colorado dismissing her sex discrimination suit against Gates Rubber

Company, in which she alleged a violation of the Civil Rights Act of 1964, Title VII, 42 U.S.C. §§2000(e) *et seq.* Following a five day trial without a jury, the District Court held that appellant was not denied promotion in employment, or demoted or terminated because of sex discrimination; and that she had not been terminated in retaliation for the filing of charges with the Equal Employment Opportunity Commission or because of the institution of the instant suit. We affirm.

Appellant asserts four questions on appeal: 1) did the District Court err in denying appellant's motion to proceed on behalf of a class; 2) did the District Court erroneously exclude evidence concerning appellant's relationship with her immediate supervisor; 3) did the District Court improperly apply the "clearly erroneous" standard of review; 4) did the District Court fail to consider evidence of continuing discrimination.

The first issue is whether the District Court abused its discretion in denying class action treatment. A motion for a class action is within the discretion of the Trial Court, and will not be overturned absent a clear abuse of discretion. *Goldstrike Stamp Company v. Christensen,* 436 F.2d 791 (10th Cir. 1970). The motion was not made until one year after institution of the suit and Mrs. Goodyear was the only named representative of the asserted class. A single affidavit of one former female employee at Gates was submitted to substantiate the class. By the time of trial, four attorneys had entered and withdrawn from this case, and there was an unusual amount of difficulty in framing the issues for this case. The District Court considered and denied the motion for a class action on three separate occasions, and expressly reserved the possibility of reopening the issue if the evidence at trial so warranted. Despite the lack of written

findings, we think the District Court acted well within its discretion in denying the class action.

The second issue is not properly before this Court on appeal, since it was specifically stricken from the complaint in the Pre-Trial Order. The District Court was very lenient in allowing evidence to be heard on the relationship between Mrs. Goodyear and her immediate supervisor, and appellant never made a satisfactory showing of materiality of the evidence sought to be introduced. We find no error in the court's exclusion of the evidence.

The third issue on the standard of review is the major question on appeal. We will first consider appellant's contentions reqarding the statistical evidence presented to the District Court. This evidence established that a very small percentage of appellee's higher level employment positions are occupied by women. The relevancy of such statistical evidence to civil rights actions is clear, and such evidence is frequently sufficient to establish a *prima facie* case of discrimination. *Spurlock v. United Airlines, Inc.*, 475 F.2d 216 (10th Cir.1972); *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970), cert. denied 401 U.S. 954. Once a *prima facie* case of discrimination is established, the burden shifts to the employer to rebut the discrimination charges. *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). Our review of tbe record discloses nothing to suggest that the District Court failed to properly consider all evidence received. In addition to evidence of a statistical imbalance between male and female employees of appellee, the District Court heard testimony in explanation of the imbalance. Additional testimony tended to rebut charges that retaliatory action was taken against appellant.

We find no evidence that the law was incorrectly applied to the facts in this case and consequently the District Court's findings are to be reviewed in this appeal in liqht of the clearly erroneous standard. *Sarah Taylor v. Honeywell, Inc.*, ____ F.2d ____ (10th Cir., filed June 7, 1974); *Spurlock, supra.* Our review of the voluminous records and files in this case does not leave us with the impression that the District Court's findings are clearly erroneous. To the contrary, we think the evidence contained in the record amply supports the District Court's findings.

The fourth issue on appeal is not strongly urged, and we need only say that appellant admits that the District Court did permit testimony bearing on the present effects of past discrimination, *Jones, supra,* and did not strictly construe against the appellant the 210-day Title VII limitation on grievances.

Upon docketing, the parties were notified that we were considering summary affirmance and of their respective rights to support or oppose such action. In response thereto each of the parties submitted memoranda supporting their respective positions. Nevertheless, a careful and thorough review of the records and files in this case (including the trial transcript) convinces us that the judgment of the District Court is correct.

Affirmed.

APPENDIX C

42 U.S.C. 1343 (4):

1343. Civil rights and elective franchise.—The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. 2000e-2(a):

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. 2000e-5(f)(3):

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title [USCS §§2000e-2000e-17]. Such an action may be

brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code [28USCS §§1404, 1406], the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

42 U.S.C. 2000e-5(g):

(g) Injunctions—Affirmative action—Equitable relief. If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the

admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 USCS §42000e-3(a)].

Rule 23(a), Federal Rules of Civil Procedure:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Rule 23(b)(3), Federal Rules of Civil Procedure:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or

defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

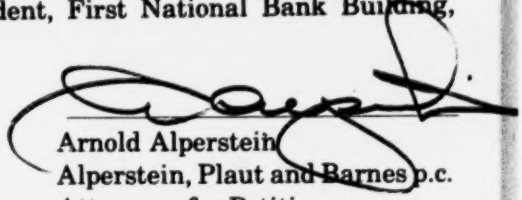
Rule 52(a), Federal Rules of Civil Procedure:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

CERTIFICATE OF SERVICE

I, Arnold Alperstein, one of the attorneys for Esther Goodyear, petitioner herein, and a member of the Bar of the Supreme Court of the United States hereby certify that on the 5th/14th days of November, 1974, I served three copies of

the foregoing Petition for Writ of Certiorari on the respondent by mailing three copies in a duly addressed envelope, with first class postage prepaid, to Dayton Denious, attorney of record for respondent, First National Bank Building, Denver, Colorado.



Arnold Alperstein
Alperstein, Plaut and Barnes p.c.
Attorneys for Petitioner
7000 West Fourteenth Avenue
Lakewood, Colorado 80215

SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
DEC 4 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-553

ESTHER GOODYEAR,
Petitioner,

vs.

THE GATES RUBBER COMPANY,
Respondent.

BRIEF OF RESPONDENT THE GATES RUBBER COMPANY OPPOSING CERTIORARI

DAYTON DENIOUS
Attorney for Respondent
2220 First National Bank Building
621 Seventeenth Street
Denver, Colorado 80202

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PROCEEDINGS BELOW

Petitioner Mrs. Goodyear, as plaintiff, brought a Title VII suit against respondent Gates in the District Court for the District of Colorado claiming that Gates discriminated against her because she was female. The case was tried without a jury. The District Court held against Mrs. Goodyear. There was no motion for new trial, but Mrs. Goodyear appealed to the Court of Appeals, which affirmed.

There was no petition for rehearing but about the ninetieth day after the decision of the Court of Appeals Mrs. Goodyear petitioned this Court for Certiorari invoking 28 U.S.C. §1254(1).

DECISIONS OF DISTRICT COURT AND COURT OF APPEALS

The decision of the District Court (Findings of Fact Conclusions of Law and Judgment of Dismissal), reported only in 6 E.P.D. ¶8996 (1973) and the unreported per curiam opinion of the Court of Appeals affirming the District Court are attached to the Petition for Certiorari as Appendix A and Appendix B respectively. As part of its brief in the Court of Appeals respondent Gates attached (and now supplies this Court as Appendix 1 to this brief) a copy of the District Court's decision annotated to some of the pertinent portions of the trial transcript.

JURISDICTION

The jurisdiction of the District Court as well as the jurisdiction of the Court of Appeals and the Supreme Court was and is conceded by respondent.

QUESTIONS PRESENTED

1. Whether the Supreme Court should now change the practice in U. S. District Courts so that if a judge, concededly acting within his discretion, denies a motion to maintain a class action he must volunteer a written or oral justification of his denial even though neither party requests it, and even though he has previously pointed out for the guidance of counsel the standards and criteria which he will apply regarding a class action.

2. Whether this Court should review the correctness of the trial judge's findings and reexamine one of his rulings on the evidence.

STATEMENT OF THE CASE

The Petition's "Statement of the Case" is not directed to the facts but merely to contentions, e.g.: "petitioner alleged" (pet. 3); "at trial petitioner's evidence showed the following" (pet. 3); "petitioner contends" (pet. 4); "other evidence was that" (pet. 5); the testimony "tended to establish" (pet. 5); "petitioner's evidence was that" (pet. 6); "it is clear from the evidence that" (pet. 6); "there was evidence that" (pet. 6).

Here are the pertinent facts:

The trial of this case started October 1 and ended October 9, 1973. There are over 800 pages of trial transcript. There was a pre-trial order in which the issues and the contentions of the plaintiff Mrs. Goodyear were all spelled out. The form of this pre-trial order was per the stipulation of Mrs. Goodyear's counsel.

The Gates Rubber Company has a factory and its main offices in Denver. In this company as in nearly every business or governmental establishment in the United States the women, who have secretarial and clerical skills, generally hold secretarial, stenographic and clerical jobs and the men, who have engineering or other specialized training, generally hold the executive and other managerial positions, which are on the average better paying jobs.

Mrs. Goodyear first became employed by Gates in 1960. She had a high school education and she had some previous work experience as a waitress and in some clerical jobs. At Gates she worked in the office as distinguished from the factory and she did clerical work and then stenographic or secretarial work.

Mrs. Goodyear was employed at Gates for almost eleven years. Most of the time she was in Industrial Belt Sales where her supervisor was Mr. Custer. Here she acted

as a secretary and she also tabulated reports from the field, work which she characterizes as "market research" but which was the type of work done by other secretaries and was and is now handled by a secretary in Mr. Custer's department who succeeded Mrs. Goodyear.

Mrs. Goodyear became dissatisfied with her job and the prospects in Mr. Custer's department. She was offered and she accepted a job with Mr. Kenney in Private Brand Tire Sales. This job had a higher classification and the starting rate represented a small increase in pay for Mrs. Goodyear.

Mrs. Goodyear did such a horrible job for Mr. Kenney that after a few months he informed her that he would not employ her after April 30 and in the meantime she was free to spend whatever time she wanted locating another position in the Company. He replaced Mrs. Goodyear with another woman.

Mrs. Goodyear's availability was communicated to all those in the company who had an opening for a person in her classification. Some interviewed but none would employ her. All selected some other woman.

On April 30, the deadline, a position opened up with Mr. Henderson in MRG Technical. This position was "Steno-A" which was a lower classification and involved a cut in pay. Mrs. Goodyear accepted the position with Mr. Henderson.

Mrs. Goodyear soon developed a dislike for her supervisor, Mr. Henderson. She set out to make things as unpleasant for him as possible. She did this by her treatment of Mr. Henderson and also by disrupting the operation of the small department where they were both employed. Her goal, as she put it to a fellow employee, was that "either he or I are going to end up seeing the psychiatrist

and it is not going to be me" (Tr. 627). She also confided to a fellow employee her belief that her supervisors "did not dare" to fire her (Tr. 618). Ultimately the Company did terminate Mrs. Goodyear's employment because her attitude and antics made it impossible to keep her as an employee. Again, her replacement was a woman.

Motion to Maintain the Case as a Class Action

At a "status call" (this case having been on file about eight months) court and counsel discussed the mechanics of determining whether there should be a class action. The court set a date for an informal conference and suggest that in the meantime plaintiff's counsel provide the court a written statement clarifying their theory and the extent of the relief they requested. The court disclosed his familiarity with pertinent decisions, and expressly referred to the *White* case, cited to this Court by petitioner (pet. 11) as setting out the proper criteria for class actions. (Reporter's Transcript, proceedings on December 1, 1971, Courtroom B)

Petitioner never saw fit to furnish the statement requested by the court, but following the status call and in advance of the informal conference counsel tendered a new complaint.

In their motion of tender counsel stated "This amended second complaint is the result of intensive and exhaustive review of plaintiff's case" (R. 86). At the informal conference plaintiff's counsel gave his idea of the standards to justify a class action as follows: "What proves that discrimination is when you have got 7,000 employees and 3,500 of them being women and 3,500 of them in the lower paying jobs. I will bet, and I think we can prove

that some of those are qualified for higher paying jobs and would have them if it wasn't for a sexist policy." Counsel's idea of how to "prove that" was to have the company compile answers to forty-nine interrogatories which he had just filed calling for an estimated 2,800,000 items of information. Interrogatory No. 11 (R. 97), for instance, asked: "11. List by job title and date, each permanent vacancy which existed within each job classification or pay group . . . on each day between July 2, 1965 and the present."

The result of the informal conference was that the court considered the tendered complaint to be vulnerable, granted leave to file another complaint ". . . following the mandate of Rule 8 of the Federal Rules of Civil Procedure that the pleadings should set forth a short and plain statement of the claim showing that the pleader is entitled to relief." The court expected a complaint ". . . with considerable brevity . . . one count reflecting counsel's position regarding the Court considering this as a class action. Likewise on that same date, a motion setting forth in more detail why the Court should consider this as a class action, and a brief in support thereof." The court asked "that the attorneys in this case pay particular attention in their briefs to the requirement for class actions as specified in Rule 23 in regard to defining the class which is alleged here, and no doubt will be alleged with some brevity in the Second Amended Complaint, the commonality of the questions of fact and law involved, typicality of the claims alleged by the plaintiff, the adequacy of the plaintiff's representation of the class."

Regarding discovery the court stated ". . . if you have certain areas that you feel this Court should consider, I think that counsel may assert those as your intention to make an offer of proof at the appropriate time . . . The Court is considering that more detailed discovery may or may not substantiate those, but at least this is your position

at this time on the class action question. You may assume that the Court will consider that as being the truth for the purposes of this class action . . . The Court . . . doesn't have to have a great body of discovery, you understand, because the Court is going to take some of your observations as about what you feel the evidence, the evidence will indicate. However, I don't want to assume the position, or the posture of the case, that 'Let's make the allegations and see where they land and see if the defendant could extricate himself from this position.' " (Reporter's Transcript, proceedings on February 25, 1972, Courtroom B)

Plaintiff tendered a revised Second Amended Complaint (R. 119), a motion for class action and brief in support. The complaint was largely a rehash of the previous complaints, and entirely ignored the court's desire for short and plain statements of the claims and a separation of the matters specifically relating to Mrs. Goodyear from matters advanced to support a class action. After consideration of the written arguments of each party the court notified counsel that he would deny the motion for class action and directed them to prepare a form of order denying the motion and reserving jurisdiction to reopen should future developments so indicate. The final form of order, as signed by the judge (R. 164), was typed by plaintiff's counsel and is endorsed by counsel for plaintiff "no objection as to form".

There was a pretrial conference and a pretrial order was entered (R. 180). One paragraph of the pretrial order incorporated the previous determination that the case not be maintained as a class action and reserved jurisdiction to the court to alter its ruling should it appear appropriate. The form of the pretrial order was approved and signed by the attorneys for each side before it was submitted to the judge for signature.

After the entry of the pretrial order and when the case had been pending for about two years the plaintiff

filed a "Motion to Reopen the Court's Determination of the Class" (R. 254). Attached was an affidavit of one Delores Cleveland, formerly employed in "Central Files", relating her disappointment some years before when her supervisor (female) was transferred and the vacancy was filled by a "twenty-four year old male trainee" rather than by Ms. Cleveland: "Irene told me that Dom Costa informed her that they wanted a man in that job."

Except for the affidavit, the motion to reopen did not purport to advise the court of any new information, or of any information for that matter. On the contrary the motion stated that "upon information and belief" plaintiff had "alleged" in her complaint "and now realleges", etc., etc.

The motion represented that "new amendments to Title VII passed March 24, 1972 clearly place responsibility on the trial court to explore employment practices as alleged by plaintiff in the broadest possible sense. Section 706(g) Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat 103." Defendant filed a memorandum which, *inter alia* set forth the cited amendment (R. 259). The amendment inserted a two-year limitation on back pay; it contained nothing to justify the assertions in plaintiff's motion.

The court denied the motion to reopen.

At the trial plaintiff moved to expand the case to a class action. This appears in the transcript at page 326: "I would just like to make the record, Your Honor, that we would ask at this time that we feel the Court has heard testimony that would indicate that this is, and should be properly maintained as a class action of Rule 23(b)(2), and the only evidence I want to cite to the Court, and the Court has heard, is, first of all, the statistical evidence which came into the Interrogatories and through Mr. Busch's testimony, which indicates that almost, if not all, of the higher salaried, higher "responsible jobs" held at Gates are held by women

and not men, and that almost, if not all, of the secretarial jobs are held by women. In addition to that, the test that was given to Mrs. Goodyear was given to all women applicants for employment during a long period of time, and that, according to the Gates Rubber Company's own testimony and their own Answers to the Interrogatories, the feminine score had no bearing whatsoever to any particular job, and also had no — was used according to the Answer to Interrogatory Number 14 to judge as a means, as a partial means of judging, whether an employee should be promoted and transferred. We feel that this clearly indicates that it is proper for the Court to reopen the class under Rule 23(c)(1). In addition, the Court has heard evidence of Mrs. Hannah Taylor, who is another woman who is a secretary with a college degree, who was, in fact, doing a man's job, receiving a woman's or secretarial's pay, and there is also evidence in the file, the evidence that Delores Cleveland, pursuant to a rule of Judge Arraj with *Taylor v. Safeway,* that we feel the Court has heard additional evidence at this time which would justify reopening the class, and we would so make that request under Rule 23(c)(1). . . THE COURT: . . . But, additionally, if this Court does have the power and authority at the trial to make a de novo determination of the motion which Judge Finesilver has denied, the Court, from the evidence presently before it, would be compelled to determine that this is not a proper place or proper action for maintenance as a class action, and assuming that the Court has the authority to make a de novo determination after hearing the Plaintiff's evidence, that motion just made by Mr. Bender is denied."

ARGUMENT

I.

WHEN THE TRIAL JUDGE, ACTING WITHIN HIS SOUND DISCRETION, DENIED THE MOTION FOR A CLASS ACTION HE WAS NOT REQUIRED TO COMPOSE AN EXCULPATORY ESSAY JUSTIFYING HIS EXERCISE OF DISCRETION.

A. *It is a universally accepted practice that trial courts do and should deny motions without delivering an accompanying opinion.*

Decisions on motions are different from decisions at the close of a trial. Motions raise narrower issues. The judge and counsel more or less kick the matter around before the motion is decided. The trial lawyer is always alert to sense the judge's view and generally knows why the judge granted or denied a motion, whether or not the judge "articulates". If he is mystified he can always ask for enlightment.

There are many more motions than there are cases. In this case the record shows twenty motions. Trial courts are overburdened already. If they are required to issue opinions every time they act on a motion their work will be multiplied to unmanageable volume.

Under the Rules exculpation is unecessary. Rule 23(a) speaks of findings but only as a condition precedent to granting a motion, the obvious reason being that granting a motion for a class action involves serious consequences, 3B Moore, *Federal Practice,* §23.02-2. One such serious consequence is that the defendant is put to enormous trouble and expense — exactly the motive of plaintiff in this case.

Present Rule 23 is, of course, the result of 1966 Amendments. When it was decided to change the Rules in 1966 no change was made in Rule 52, which still provides that (with

exceptions not here pertinent) "Findings of Fact and Conclusions of Law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion. . ."

Under the general and accepted practice when a court decides to deny relief which it has the discretion to grant or withhold it simply issues an order denying the application for the relief. On review the question is not whether the lower court artfully articulated its decision but whether the appealing party can show an abuse of discretion. The appellate court affirms if the record discloses adequate grounds on which the lower court could have correctly decided; it does not require the lower court to prove its mental processes. A recent example of this accepted and up to now unquestioned practice is *National Association for the Advancement of Colored People v. New York,* 413 U.S. 345. It is fairly elementary that lower courts are presumed to do their duty, *Doe, ex dem. Farmer's Heirs v. Eslava,* 9 Howard 421, 444 (1850), and that the Supreme Court "must presume the ruling of the court to be right, in the absence of anything showing it to be wrong", *Leftwitch v. Lecanue,* 4 Wallace 187 (1867).

B. *The District Court clearly followed the proper criteria.*

Petitioner professes worry over whether the district court was guided by the proper criteria as illustrated by *White v. Gates Rubber Co.,* 53 F.R.D. 412 (pet. 11) and other cases.

Petitioner took no initiative to get a determination regarding class action. The initiative came from the status call and the informal conference, at both of which the court displayed familiarity with the pertinent considerations, mentioning the *White* case by name, reminding counsel of the various elements required for a showing under Rule 23 and suggesting an easy method for plaintiff to handle the evidentiary aspects of such showing.

All of which were disregarded by petitioner when she moved for a class action.

When, after an "intensive and exhaustive review of plaintiff's case", plus two years of preparation, investigation and discovery, and eleven years' experience with Gates and opportunity to observe its operations from the inside, petitioner based her motion to reopen merely on allegations "upon information and belief" and relied on a supposed but non-existent amendment of the law, the court was not provided with any reason to reopen and there was no occasion to write a treatise.

What would petitioner have the court do — make a written pronouncement telling the plaintiff "You have not given me any grounds for reopening"? Denying the motion said exactly that.

Subsequently, during the trial, when counsel moved for a class action the trial judge did give reasons for the denial (Tr. 328).

C. *If the petitioner thought there should be more "articulation" she should have said so.*

Counsel are supposed to be officers of the court and should help the court, not come up with exaggerated afterthoughts. If actually left adrift with no guiding star counsel could have:

moved for reconsideration;

asked for a meeting with the judge;

asked the court to include the desired articulation in the written order denying their motion;

included the lack of articulation as one of the grounds of their motions to reopen, or when the motion was made during the trial;

asked the court to include the articulation in the pretrial order;

moved for new trial; or

moved the court of appeals for rehearing.

Instead counsel stipulated to the form of order denying the motion for class action, stipulated to the pretrial order, did not bother to tender any findings of fact or conclusions of law or to move for new trial or for rehearing.

If present counsel harbor doubts about the trial it is because they were not there and have not taken the trouble to find out what went on; and they should not presume to criticize the district court which gave plaintiff's case painstaking and careful consideration.

D. *There is no basis for considering a class action.*

According to petitioner's argument every business in the United States is prima facie guilty of discrimination, as it is a fact that men generally hold most of the higher paying jobs in government and business in the United States. *U.S. Bureau of the Census, Census of Population: 1970 Detailed Characteristics, Report PC(1)-D1 U. S. Summary, Report PC(1)-D7 Colorado*

The lower courts have uniformly held that if you want to go on an imbalance the inquiry is directed to the comparative numbers of available and qualified people, not just the number of bodies. *Frocht v. Olin Corp.*, 344 F.Supp. 369 (S.D.Ind.); *McAdory v. Scientific Research Instrument Inc.*, 355 F.Supp. 468 (D.Md.); *Logan v. General Fire Proofing Co.*, 5 E.P.D. ¶8012 (D.N.C.); *Sidberry v. Stage Employees (IATSE), Local 307*, 5 E.P.D. ¶7976 (D.Pa.)

The rule of these cases was approved by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, which stresses the importance of qualifications, using the word "qualified" or "qualifications" four times in a single paragraph of the opinion (411 U.S. at 802).

Petitioner, after a trial which took a week, now as be-

fore has no facts and relies on mere unsupported allegations. Anyone is free to make allegations. Therefore, under petitioner's theory, it is no problem to allege oneself into Rule 23:

> You start with a female plaintiff.
>
> She selects a large class, thereby taking care of numerosity: "Petitioner seeks to represent all present and former female employees who have been employed by the respondent since July, 1965." (pet. 9).
>
> She makes a general allegation of discrimination against women, which takes care of all other requirements of Rule 23(a) and Rule 23(b)(2): "The allegation which applies to all members of the class is that the respondent has denied equal employment opportunity to women." (pet. 10). "Such 'across-the-board' allegations of employment discrimination are sufficient to meet the requirement of common questions of law or fact of Rule 23(a)(2)." (pet. 10)
>
> She represents the class, since all have women's interests and it makes no difference that she herself does not have a case (pet. 11).

If petitioner is correct then any woman can at any time file a boiler plate complaint and maintain a class action with herself as private attorney general.

In none of the cases which petitioner cites for the proper application of Rule 23(a) and (b) (pet. 8) did the court rule for a class action on the strength of mere allegations. In each case the pertinent facts indicating the type of wrong and the scope of the class were established by affidavits, discovery, a detailed S.E.C. study, evidentiary hearings or otherwise.

City of New York v. International Pipe, 410 F.2d 295 (2d Cir.) stresses the trial court's breadth of discretion which should be exercised "in the light of the particular facts present" (410 F.2d at 300).

II.

THE DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE SUPPORTED BY THE EVIDENCE

The trial court heard out petitioner at great length: she got to tell everything she had on her mind or could show by others excepting only her claim that she went to bed with the boss one night in a private apartment; on her (and his) own time, outside of working hours.

How that evidence bears on a Title VII case has never been suggested.

The legal principles applicable to the facts as found by the trial judge are too clear for argument. His findings are massively supported by the evidence. See our annotations to the findings, attached as Appendix 1.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

Dayton Denious
Attorney for Respondent
2220 First National Bank Building
621 Seventeenth Street
Denver, Colorado 80202

APPENDIX 1

Esther Goodyear v. The Gates Rubber Company

District Court's

FINDINGS OF FACT

Transcript References	
19	1. The plaintiff is a high school graduate and except for some instruction in typing and secretarial work, she had no further formal education prior to her employment by the defendant.
242 243	2. Prior to her employment by the defendant, plaintiff was employed for a period of three years as a waitress, approximately two years as a bookkeeper, and for approximately one year as a bookkeeping machine operator.
23 243 464-465	3. In 1960, plaintiff applied to defendant for employment and was employed by the defendant in a clerical capacity and she was thereafter continuously employed by defendant until her discharge in April of 1971.
24 25 26 230	From May of 1963, until October 1969, she was employed in the Industrial Belt Sales Division of the Company as a secretary. Her supervisor was a Mr. Stetson, who was later succeeded by Mr. Custer, who continued to be her supervisor until she left that Department in October 1969.
260-262 267-271 460 461	4. Becoming dissatisfied with the lack of opportunity for advancement in the Industrial Belt Sales Department, in 1969 she requested a transfer to another division. In

Transcript References	
	late 1969, she was offered and accepted a position in the Private Brands Sales Department whose manager was Mr. Kenney. This new position was a promotion in classification and a small increase in pay.
127 130-134 139 271 404 406 411-415 432-436 442-455	The plaintiff's position with the Private Brand Sales Department had previously been performed by one Maryln Jones, who was promoted, thus creating the vacancy filled by the plaintiff. Maryln Jones was assigned by Mr. Kenney to train the plaintiff in her new position. Although the plaintiff had the technical skills to do the work required, she did not perform the work adequately or satisfactorily.
296 413 414-415	Mr. Kenney notified the plaintiff that because of her failure to perform her work in a satisfactory manner that it would be necessary for him to dispense with her services effective April 30, 1970, and that she should, in the meantime, locate another position of employment with the company.
130-132 295 415 445-455	Whether her failure to perform was due to lack of proper training by Miss Jones or a lack of interest or a refusal on the part of the plaintiff to accept training, was the subject of conflicting evidence, but there is no evidence that she was replaced because she was a female.
295 405 413-414	The vacancy created by the termination of the plaintiff's employment with the Private Brands Sales Department was filled by

Transcript References

another female who performed the work in a satisfactory manner.

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5. The plaintiff's availability for other employment within the company was circulated to other departments, and a few interviews were granted, but none of the departments who had vacancies to be filled equal to the plaintiff's classification were willing to employ her. The refusal of these department managers was in no way influenced by the fact that the plaintiff was a female and there is no evidence that any of these positions were filled by other than female employees.

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Ptf Ex. 5

6. On April 30, 1970, the day on which plaintiff's employment with Mr. Kenney expired, the plaintiff was notified of a vacancy in the MRG Technical Department of which Claude Henderson was the supervisor. The classification of the position was "Steno A" a lower-rated job and one which paid less than the secretarial position which plaintiff held in Mr. Kenney's department. The plaintiff accepted this position and was employed in that position from May 1, 1970, until her termination on April 16, 1971.

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7. Shortly after she took this position, the plaintiff evidenced an extreme dislike for and hostility toward Mr. Henderson, the Manager of that department and engaged in a course of conduct which disrupted the operation of the department and the morale

Transcript References

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of the employees. This conduct included the generation of arguments with fellow employees, sarcastic comments directed to Mr. Henderson and fellow employees, hostile and antagonistic attitudes toward them and a non-cooperative attitude in carrying out her duties.

Def Ex J
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This conduct so affected the efficiency and morale of the department that Mr. Henderson's superior, Mr. Redmond, in August 1970, required reports from Mr. Henderson as to the plaintiff's attitude and activities. Exhibit J contains the notes kept by Mr. Henderson of plaintiff's conduct and these notes were the basis for Mr. Henderson's reports to Mr. Redmond.

Page 4
Pretrial
Order
(R 180)

On or about November 9, 1970, the plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission. In this claim she stated:

> "The company discriminates against women by placing them into lower job classifications, by denying them promotional opportunities in a similar manner as those opportunities offered to male employees, and by imposing different terms, conditions and privileges of employment. I have been recently demoted and have not been given job advancement opportunities because I am female."

Transcript References

Undisputed — Thereafter, the plaintiff received from the Commission, a notice of her right to bring suit in the United States District Court and this action was instituted accordingly on March 10, 1971.

180, 184, 187, 534, 535, 536, 538, 630, 634-635, 640-642, 660-661 — At the time Mr. Redmond arrived at his decision to terminate the plaintiff's employment, neither he nor Mr. Henderson were aware of the fact that the plaintiff had filed charges with the Equal Employment Opportunity Commission and Mr. Redmond's decision to terminate the plaintiff was made prior to the filing of this action.

121, 139, 543, 544, 666 — The Court finds that the decision to terminate plaintiff's employment was not, either in whole or in part, in retaliation for the plaintiff's filing charges with the Commission and the institution of this action.

234, 235, 236, 237-242, 464-470 — 8. The evidence fails to show any occasion when the company had an opening for employment in a position for which plaintiff was qualified and which was a better position than that held by her and which the company denied to her because she was female.

136, 156, 202, 215-221, 226-228 — 9. Plaintiff testified to a number of matters such as work breaks, with respect to which she alleged she had been treated unfairly. In most instances, her testimony did not fix the dates when the alleged wrongs occurred and in all such cases, her claim was only that she as an individual had not been

Transcript References

treated fairly and not that she had been so treated because she was a female.

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10. Plaintiff complained of a psychological test administered to her in 1969 which purported to measure a number of qualities including "feminity". There is no evidence that this test was used to the prejudice of females as a class or that it ever operated to the prejudice of plaintiff.

11. The evidence does not sustain any claim upon which the plaintiff is entitled to relief.

12. There was introduced into evidence proceedings before the Industrial Commission of the State of Colorado adjudicating a claim of the plaintiff after her discharge for unemployment compensation benefits. These proceedings were offered by the defendant on the theory that the findings of the Commission of the reasons why the plaintiff was discharged by the defendant are binding on this Court in this proceeding. The tender for this purpose is refused and this Court determines that the findings of the Industrial Commission in this respect are not binding on this Court and are not proper evidence to be considered by this Court. The Court therefore has arrived at its Findings of Fact from evidence other than the findings of the Industrial Commission and these findings have been entirely disregarded by the Court.